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16-17-18

Nos. ~~493, 494, and 495~~

FILED
APR 26 1930
CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE STATE OF FLORIDA AND A. S. WELLS, E. S. MATTHEWS, ET AL., ETC., APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

BROOKS-SCANLON CORPORATION, WILSON CYPRESS COMPANY, CUMMER CYPRESS COMPANY, APPELLANTS

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

WILSON LUMBER COMPANY OF FLORIDA, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	3
Statement	3
Summary of argument	16
Argument:	
I. The order of the Interstate Commerce Commission prescribing intrastate Florida log rates to be charged by the Atlantic Coast Line was within the scope of the Commission's statutory authority under Section 13 (4) of the Interstate Commerce Act	18
II. The order of the Interstate Commerce Commission directing an increase in the Atlantic Coast Line's Florida log rates to remove an undue discrimination against interstate commerce was issued after a full hearing	25
III. There was sufficient evidence to sustain the finding of the Interstate Commerce Commission that the Atlantic Coast Line's Florida intrastate log rates caused undue discrimination against interstate commerce	28
Conclusion	37
Appendix: Interstate Commerce Act, Secs. 3 (1), 13 and 15a (2)	38

CITATIONS

Cases:	
Alabama v. *United States*, 279 U. S. 229	23
American Express Co. v. *Caldwell*, 244 U. S. 617	28
Arkansas Jobbers & Mfrs. Asso. v. *A., T. & S. F. Ry. Co.*, 118 I. C. C. 238	24
Colorado v. *United States*, 271 U. S. 153	18, 30
Ill. Cent. R. R. Co. v. *Public Utilities Comm.*, 245 U. S. 493	29
Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541	28
Louisville and Nashville R. R. Co. v. *United States*, 238 U. S. 1	34
New England Divisions Case, 261 U. S. 184	28

Cases—Continued. Page

New Mexico Corp. Comm. v. *A. T. & S. F. Ry. Co.*, 93 I. C. C. 43 24

New York v. *United States*, 257 U. S. 591 24

Pierpont Mfg. Co. v. *Southern Ry. Co.*, 50 I. C. C. 81 7

Salt Cases of 1923, 92 I. C. C. 388 24

Southern Cotton Oil Co. v. *A. C. L. R. R. Co.*, 120 I. C. C. 190 7

Southern Veneer Association v. *A. C. L. R. R. Co.*, 62 I. C. C. 669 7

Southwestern Brick Cases, 107 I. C. C. 681 24

Tagg Bros. & Moorhead v. *United States*, 280 U. S. 420 24

United States v. *Abilene & So. Ry. Co.*, 265 U. S. 274 35

Virginian Ry. v. *United States*, 272 U. S. 658 28

Wisconsin R. R. Comm. v. *C., B. & Q., R. R. Co.*, 257 U. S. 563 ..... 16, 22, 24, 29

Statute:

Interstate Commerce Act—

Section 3 (1)—(c. 104, 24 Stat. 380; c. 91, 41 Stat. 479; U. S. C. title 49, sec. 3) 38

Section 13—(c. 309, 36 Stat. 550; c. 91, 41 Stat. 484; U. S. C. title 49, sec. 13) 38–41

Section 15a (2)—(c. 91, 41 Stat. 488; U. S. C. title 49, sec. 15a) 41

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 493

THE STATE OF FLORIDA AND A. S. WELLS, E. S. Matthews, et al., Etc., appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, et al.

No. 494

BROOKS-SCANLON CORPORATION, WILSON CYPRESS Company, Cummer Cypress Company, appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, et al.

No. 495

WILSON LUMBER COMPANY OF FLORIDA, APPELLANT

v.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

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OPINIONS BELOW

The opinion of the specially constituted District Court upon the original hearing (R. 44) is reported in 30 F. (2d) 116. The opinion of that court upon rehearing (R. 167) is reported in 31 F. (2d) 580. The report of the Interstate Commerce Commission (R. 16) is reported in 146 I. C. C. 717.

JURISDICTION

The final decrees of the District Court were entered April 22, 1929. (R. 170, 951, 1013.) Petitions for appeal were filed June 6, 1929, and were allowed the same day. (R. 171, 178, 952, 959, 1014, 1020.)

The jurisdiction of this Court rests on the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C. Title 28, Sec. 47), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, Sec. 345).

QUESTIONS PRESENTED

The questions presented are (1) whether an order of the Interstate Commerce Commission increasing the Atlantic Coast Line's intrastate Florida log rates in order to remove undue discrimination against interstate commerce was authorized by Section 13 (4) of the Interstate Commerce Act, (2) whether this order was issued after the Commission had allowed a full hearing on the question of

undue discrimination against interstate commerce, and (3) whether there was sufficient evidence to sustain the Commission's finding of undue discrimination against interstate commerce.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, pp. 38–41.

STATEMENT

Appellants in No. 493, the State of Florida and A. S. Wells, E. S. Matthews, and Mamie G. Eaton, as and constituting Florida Railroad Commission, brought suit in the United States District Court for the Northern District of Georgia, sitting as a specially constituted three-judge court, to set aside and enjoin that part of an order of the Interstate Commerce Commission which required the Atlantic Coast Line Railroad Company (hereinafter sometimes called "the Atlantic Coast Line") to establish carload rates for logs (except walnut, cherry, and cedar) moving in intrastate commerce throughout the State of Florida the same as those prescribed by the Commission for logs moving in interstate commerce from northern Florida to destinations on its line in Georgia. (R. 1, 15–16.) Suits to obtain the same relief were brought in the same court by appellants in No. 494 and by appellant in No. 495. (R. 870, 960.) The Atlantic Coast Line and the Georgia Public Service Commission (hereinafter

sometimes called "the Georgia Commission") were allowed to intervene in each case. (R. 31, 150, 888, 935, 973, 1001.) The three suits were consolidated by the District Court and the present appeals are from final decrees on rehearing dismissing appellants' original and supplemental bills. (R. 43, 170, 951, 1013.)

On May 3, 1926, the Georgia Public Service Commission filed a complaint with the Interstate Commerce Commission against the Atlantic Coast Line. (R. 193.) The complaint set forth the intrastate Florida log rates of the Atlantic Coast Line and the interstate log rates of that railroad between Florida and Georgia for all distances up to 170 miles and showed that for all distances of 15 miles or more the latter rates were more than twice the former and were at certain distances 233% higher. (R. 194, 197–198.) The complaint charged that these interstate rates were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, unjustly discriminatory in violation of Section 2 of the Act, and unduly prejudicial to the interstate shipper and preferential in favor of the intrastate shipper in violation of Section 3 of the Act. (R. 196.) It also charged that the Florida intrastate rates caused undue, unreasonable and unjust discrimination against interstate commerce in violation of Section 13 of the Act. (R. 196.) The complaint asked the Commission to determine just, reasonable, nondiscriminatory and nonprejudicial

interstate rates to be observed by the railroad for the transportation of carload shipments of logs "from all points located in the State of Florida to all destinations located in the State of Georgia" and that the measure of these rates be no higher than the rates concurrently in effect for the same kind of property moving in intrastate commerce within the State of Florida. (R. 197.) The answer of the Atlantic Coast Line admitted the difference between the Florida intrastate rates and the Florida-Georgia rates, denied that the interstate rates were either unjust or unreasonable and alleged that "to whatever extent there may be discrimination against interstate shippers or interstate commerce under the rates complained of, such discrimination is not attributable to anything voluntarily done" by that railroad. (R. 199–200.)

The State of Florida was notified of the complaint pursuant to Section 13 (3) of the Commerce Act and the Florida Railroad Commission (hereinafter sometimes called "the Florida Commission") appeared in defense of its rates. (R. 400, 401.) Certain Georgia lumber manufacturers intervened or appeared in support of the complaint. (R. 205, 422, 532, 544, 553.) Appellants in No. 494 and other Florida interests intervened or filed petitions to intervene in behalf of the Florida rates. (R. 207, 212, 215, 217, 221, 223, 230.) Four railroads operating intrastate in Florida and interstate between Florida and Georgia and the American Short Line

Railroad Association representing Short Line Railroads so operating intervened in opposition to the continuance of the Atlantic Coast Line's intrastate Florida rates and to the adoption of these rates for interstate application. (R. 224, 226.)

At the hearing before examiners of the Interstate Commerce Commission no evidence was introduced in support of a violation of Section 2 of the Commerce Act and there was little, if any, evidence that the interstate Florida-Georgia rates were unreasonable *per se* in violation of Section 1 of the Act. All the evidence therefore related to the Florida intrastate rates as effecting either any undue, unreasonable, or unjust discrimination against interstate commerce in violation of Section 13 (4) of the Act or any undue or unreasonable prejudice against persons or localities in violation of Section 3 or Section 13 (4).

The Georgia Commission did not offer any schedule of reasonable Florida-Georgia rates but insisted that these rates should be no higher than the Florida intrastate rates. (R. 707–708.) The rate expert for the Georgia Commission testified that the Florida intrastate rates involved in the case applied between any two points on the Atlantic Coast Line's railroad for any distance up to 170 miles. (R. 416.)

The Atlantic Coast Line, while contending that its existing Florida-Georgia rates were reasonably low, offered to put into effect a lower schedule,

which the Interstate Commerce Commission in its order in this case substantially adopted. (R. 22, 27, 486.) It was shown that the proposed Florida-Georgia rates had been approved by the Alabama Public Service Commission, and that they had been approved by the Georgia Commission to become effective June 1, 1925, although this Commission had suspended the rates after evidence had been submitted of an "intolerable situation" existing as to Florida intrastate rates. (R. 291–293, 480.) It was also shown that they had been approved, with slight variations, by the Interstate Commerce Commission for interstate application between points in Georgia and South Carolina and South Carolina and North Carolina (*Pierpont Mfg. Co.* v. *Southern Railway Co.*, 50 I. C. C. 81; *Southern Veneer Association* v. *A. C. L. R. R. Co.*, 62 I. C. C. 669) and had been proposed for adoption by an examiner in a pending case, the Commission itself adopting these rates prior to its decision in the instant case (*Southern Cotton Oil Co.* v. *A. C. L. R. R. Co.*, 120 I. C. C. 190). (R. 21, 291–293, 484–485.) For all distances of 25 miles or more the Florida intrastate rates were less than half of these rates which two State Commissions and the Interstate Commerce Commission had almost concurrently approved.

The Florida intrastate rates of the Atlantic Coast Line did not rest on the usual rate considerations. They represented rates, taking into account percentage increases and decreases and some exten-

sion in the distance covered by the scale, established in 1903, and generally known as the Cummer scale, between a mutually owned lumber company and a railroad. (R. 258, 269, 469–470.) The Atlantic Coast Line later acquired the railroad but did not renew the rate contract when it expired in 1918. (R. 19.) In 1914 the Atlantic Coast line and a lumber company, the predecessor of appellant Brooks-Scanlon Corporation, entered into a contract which at the time of the hearing was still in effect. (R. 261, 470, 492.) Under the terms of this contract solid log trains of not less than 30 cars were to be operated every working day and the contract was to continue until such time as the timber then owned by the company in two Florida counties, consisting of approximately 1,000,000,000 feet of pine, had been transported. (R. 268, 470.) The lumber company agreed in the contract that any rail movement of the product manufactured from the logs should be over the Atlantic Coast Line if the rates were as low as any other available rates. (R. 267.) The contract obligations were subject to Federal and Florida laws and to the order of any court or commission of competent jurisdiction. (R. 268.) Pursuant to this contract the Atlantic Coast Line filed a tariff covering train-load movements with the Florida Commission which the Commission refused to approve unless it was made generally applicable to single car movements. (R. 471.) The Atlantic Coast Line, rather than repudiate its contract obli-

gations, elected to make the rates applicable on any number of cars of logs between any two stations in Florida. (R. 475.)

After this tariff had been presented to the Florida Commission in 1914 its rate expert wrote the Atlantic Coast Line that in the opinion of the Commissioners the log rates were "too low," that the Commissioners regretted that the railroad had seen fit to publish "these extremely low rates" and that the rates were published "in direct opposition" to the advice and suggestions of the Commissioners. (R. 270–271.) The letter referred to the rates as "barely remunerative," said that to make them would reduce the railroad's power "to make other just and reasonable rates" and asserted that they "amount practically to a discrimination against other classes of freight." (R. 271.)

In August, 1915, the Chairman of the Florida Commission wrote that the Commissioners thoroughly agreed that the Atlantic Coast Line log rates were "too low" and that the Florida rates generally applicable on logs had been put into effect after an extended investigation, and that they were lower than the rates in six other southeastern States, in which States conditions were practically the same. (R. 272–274.) The Atlantic Coast Line's Cummer scale was more than 50% lower than these log rates established by the Florida Commission. (R. 274.)

The assistant freight traffic manager of the Atlantic Coast Line testified that if anything ap-

proaching the Cummer scale should be made the measure of reasonableness of the railroad's log rates generally, the result from a revenue standpoint could not be justified (R. 477); that he doubted exceedingly whether these rates were compensatory (R. 492); that it would be out of the question to substitute for its interstate mileage scale on logs any scale even approximating its Florida intrastate scale (R. 484); and that the Cummer scale was no more than one-half of the rates generally applicable on logs in the southeast, where logs are handled on a particularly low level of freight rates. (R. 287, 477.) The Atlantic Coast Line would not to-day enter into the contract which it made in 1914; the conditions then offered greater chance of profit than did present conditions. (R. 491.)

The superintendent of transportation of the Atlantic Coast Line, whose work included the preparation of cost and efficiency statistics (R. 522–523), introduced a study of the cost per car of transporting logs during the month of September, 1926, for the Brooks-Scanlon Corporation. This represented approximately the most economical conditions of transportation possible under the Florida rates. Under the contract with the predecessor of Brooks-Scanlon Corporation transportation was in solid daily log trains and September was one of the least expensive months from an operating standpoint. (R. 470; 530.) There was included an allowance of interest at 6% on the cost of

the equipment used but no interest allowance for land or roadbed. (R. 294, 298.) The figures used were supported by the testimony of a freight conductor of the Atlantic Coast Line and of the superintendent of its terminals at Jacksonville, Florida, who were both engaged in the movement of cars in and out of the Brooks-Scanlon Corporation's lumber plant. (R. 586–587, 591.) The total cost per car shown was $19.13 as against a per car revenue of $20.47. (R. 294, 522.) A computation predicated upon this cost study made by the rate expert of the Florida Commission showed a total per car cost of $14.20. (R. 369–370.) This computation did not include any allowance for interest on equipment and it was based on a partial observation of one day's operation. (R. 371–372, 633, 711.) The accuracy of the Atlantic Coast Line's cost study was vigorously defended (R. 709–713) and no reply was made to this defense.

The Florida intrastate, Georgia intrastate, and Florida-Georgia interstate log rates of the Georgia, Southern & Florida Railway Company and the Alabama, Georgia and South Carolina intrastate log rates of the Southern Railway Company were more than twice as high as the Cummer scale for all corresponding distances over twenty miles. (R. 238–242, 245–247.) The Georgia intrastate log rates of both these railroads were, for corresponding distances of sixty miles or more, generally three times greater than the Cummer scale. (R. 239–240, 246–247.) The lowest log rates shown for

these railroads were the North Carolina intrastate rates for the Southern Railway Company and even these were, for distances of seventy-five miles or more, approximately twice the Cummer scale. (R. 247.) Both the commerce agent of the Seaboard Air Line Railway Company and the assistant general freight agent of the Central Georgia Railway Company testified that the Cummer scale was unduly low. (R. 433, 434, 439, 455, 456.)

The per-car revenue of the Atlantic Coast Line from logs moving intrastate in Florida on the Cummer scale was less than half the per-car revenue from brick, gravel, and sand, lime and cement moving on its line Georgia-Florida interstate. (R. 279–280.) For distances of 35 miles or more the per-car revenue on each of these commodities was over three times the revenue from the Cummer scale. (R. 279–280.) A very similar relation existed between the per-car revenue from the Cummer scale and the per-car revenue from these commodities moving intrastate on the Atlantic Coast Line in Georgia and intrastate on its line in Florida, with limestone substituted for gravel in the schedule of Florida intrastate rates. (R. 282, 284.) The lopsided rate structure brought about by the Cummer scale is further shown by the fact that the Florida intrastate log rate on the Atlantic Coast Line for a car of 55,000 pounds was $20.35 for 170 miles and, after the Cummer scale ended, $45.82 for 180 miles, although for the next 120 miles the rate increased less than $10. (R. 283, 285.)

There was evidence that no traffic on the Atlantic Coast Line other than logs was handled on a lower rate basis than brick and road-building materials; that there was no traffic on its line in Georgia that had lower transportation characteristics than brick, gravel, and sand; that while logs might be charged a higher rate than sand or gravel because of their greater value, they should not, from a transportation standpoint; and that all three of these commodities were cheap, heavy, and without substantial claim risks. (R. 481, 508.)

There was testimony by Georgia manufacturers that merchantable timber on the Atlantic Coast Line could be purchased in northern Florida and that the rate advantage which Florida lumber companies enjoyed over Georgia manufacturers prevented the latter from competing with Florida companies for the purchase of timber in northern Florida. (R. 422–423, 432, 444, 446, 533, 544, 557.) While the Georgia manufacturers primarily desired to have the Cummer scale extended to Florida-Georgia commerce, they also strenuously insisted on parity between the rates and on the advantage to themselves of such parity. (R. 426, 427, 449, 537, 545, 548.)

The report proposed by the examiner of the Interstate Commerce Commission stated that complainant's evidence was mainly in support of its allegations under Sections 3 and 13. The examiner reported his opinion that the evidence did not jus-

tify the finding that the Florida intrastate rates of the Atlantic Coast Line violated either of those sections. (The examiner's report, although a part of the record before the District Court, was not included in the printed record before this Court, but it is being printed as a supplement to this record pursuant to a stipulation of the parties filed with the Clerk of this Court.)

In August, 1928, a division of the Commission found that the Florida-Georgia rates proposed by the Atlantic Coast Line for application between points on its railroad in northern Florida and Georgia destinations were reasonable, and it ordered the railroad to establish these rates for transportation of logs, except walnut, cherry, and cedar, from north Florida points to Georgia. (R. 16, 25, 27.) It found that the Atlantic Coast Line's log rates intrastate in Florida up to 170 miles resulted in undue prejudice to shippers from Florida into Georgia and in undue discrimination against interstate commerce and that this undue prejudice and undue discrimination could and should be removed by establishing Florida intrastate rates corresponding to those found reasonable for interstate application from Florida to Georgia. (R. 26.) It ordered the railroad to establish such rates for intrastate commerce within the State of Florida. (R. 27–28.) Appellants in Nos. 493 and 494 filed petitions for reargument and reconsideration directed to the whole Commission and appellant in No. 495 filed a like petition and a petition for leave

to intervene. (R. 818, 841, 865.) All of these petitions were denied by the full Commission. (R. 870.)

Suits to enjoin enforcement of this order were filed by appellants in Nos. 493, 494, and 495 in the United States District Court for the Northern District of Georgia. The opinion filed by that court construed the Commission's order as applying to intrastate rates only within the region in northern Florida covered by the Commission's order as to interstate rates and it entered decrees dismisisng the bills. (R. 44, 52, 901, 984.) Thereafter, on February 7, 1929, the day before the Commission's order was to become effective, the Commission issued a clarifying order which made the prescribed Florida intrastate rates applicable "within and throughout the entire State of Florida, without exception." (R. 54, 90.) Appellants thereupon filed supplemental bills in the same District Court and the court on rehearing entered a final decree in each suit dismissing the original and supplemental bills. (R. 170, 951, 1013.) The court held that the evidence would not justify a state-wide order altering the intrastate rate because of undue prejudice to shippers and localities, but held that the order was valid because there was sufficient evidence to support the Commission's finding that the assailed State rate was so low as to cause undue discrimination against the carriers' general interstate commerce. (R. 168–169.)

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SUMMARY OF ARGUMENT

1. Paragraph (4) of Section 13 of the Interstate Commerce Act authorizes the Interstate Commerce Commission to remove any undue discrimination against interstate commerce caused by an intrastate rate and paragraph (3) of Section 13 provides that the State shall be notified if any rate "made or imposed" by State authority is brought in issue before the Commission. This directory provision of paragraph (3) is not a jurisdictional limitation on the Commission's power under paragraph (4) and its authority under the latter paragraph extends to any intrastate rate, whether or not made or imposed by State authority. But even if the directory provision is a jurisdictional limitation, the Commission could deal with the Atlantic Coast Line's Florida log rates under Section 13 (4) since these rates were made or imposed by the State of Florida.

The terms of Section 13 (4), its purpose as construed by this Court in *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, and its interpretation in decisions of the Commission clearly indicate that it permits the Commission, in any proceeding authorized by the Act where undue discrimination against interstate commerce is in issue, to act against any offending intrastate rate. The Commission therefore was authorized by the statute to make a finding in this case of undue discrimination against interstate commerce although the proceeding before the Commission was not

initiated for the sole purpose of increasing an intrastate rate and although it did not involve the entire rate structure of a State.

II. The complaint filed with the Commission charged that the Florida log rates of the Atlantic Coast Line caused undue discrimination against interstate commerce in violation of Section 13 (4) of the Commerce Act and asked relief against this violation. The intervention of certain railroads raised the same issue and it was indirectly raised by the answer of the Atlantic Coast Line. The complainant alone could not waive this issue and it also did not intend so to do. The examiner who conducted the hearing considered and passed upon this issue. Full opportunity was given to present evidence and arguments on the issue of undue discrimination against interstate commerce and the Commission's order directed to the removal of undue discrimination was based on a full hearing.

III. Where an order of the Commission interferes with a rate which has been put into effect in the affirmative exercise of the rate-making power of a State, a higher degree of proof may be required to sustain it than is required on a court review of other orders of the Commission. We submit that this requirement of a special degree of supporting evidence, if it exists, does not apply to the Commission's order increasing the Atlantic Coast Line's Florida intrastate log rates, since these rates were not put into effect by any exercise of the State of Florida's rate-making power. Where an order of

the Commission, as in this case, merely trenches, in the interest of interstate commerce, on the traditional reserved powers of the State, it is binding when supported by substantial evidence. *Colorado* v. *United States,* 271 U. S. 153. But whatever the degree of proof required, there was here convincing proof, in the form of a showing of the carrier's costs in transporting logs intrastate in Florida in relation to its revenue therefrom under the assailed rates, in the form of extensive and pertinent comparisons with other rates, and in the form of direct testimony, that the rates under attack were so low as to cause undue discrimination against interstate commerce.

ARGUMENT

I

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION PRESCRIBING INTRASTATE FLORIDA LOG RATES TO BE CHARGED BY THE ATLANTIC COAST LINE WAS WITHIN THE SCOPE OF THE COMMISSION'S STATUTORY AUTHORITY UNDER SECTION 13 (4) OF THE INTERSTATE COMMERCE ACT

Appellants contend that the Interstate Commerce Commission could not regulate the Florida intrastate log rates of the Atlantic Coast Line under Section 13 (4) of the Act because these intrastate rates were not "made or imposed by authority of any State" within the meaning of Section 13 (3) of the Act. We submit that the authority given the Commission by Section 13 (4) is not limited to rates "made or imposed" by State authority and

that, in any event, the Atlantic Coast Line's Cummer scale was made or imposed by authority of the State of Florida.

The first two paragraphs of Section 13 permit the Commission to make investigations on complaint of any "person, firm, corporation, company, or association" or of any carrier or State railroad commission, or on its own motion. The third and fourth paragraphs of the section were added by the Transportation Act, 1920 (c. 91, sec. 416, 41 Stat. 484). Both paragraphs (3) and (4) deal with intrastate rates. Paragraph (3) permits the Commission to cooperate with State regulatory authorities having jurisdiction over railroads and also requires the Commission to notify the State if any investigation by the Commission involves an intrastate rate made or imposed by State authority. Paragraph (4) condemns any discrimination against interstate commerce by an intrastate rate and authorizes the Commission to remove such discrimination and also to remove any undue prejudice against persons or localities caused by the relation of an intrastate rate to an interstate rate.

Paragraph (3) begins:

> Whenever in any investigation under the provisions of this Act, * * *

Paragraph (4) begins:

> Whenever in any such investigation * * *

In so far as the words "such investigation," in paragraph (4) refer back to paragraph (3), they

seem to relate to the general provisions of paragraph (3) dealing with any investigation authorized by the Act involving an intrastate rate. We submit that these words in paragraph (4) do not incorporate as a jurisdictional limitation upon the authority of the Interstate Commerce Commission thereunder the directory provision of paragraph (3) that the State be notified whenever an intrastate rate involved in an investigation undertaken by the Commission was made or imposed by State authority. Such a construction must be rejected because not required by the words of the statute and because, if adopted, it would lead to the absurd result that the Interstate Commerce Commission could regulate intrastate rates when made or imposed by State authority but could not regulate them when not so made or imposed.

A second objection to appellants' contention is that sustained by the District Court, namely, that the Atlantic Coast Line's Cummer scale was "made or imposed" by authority of the State of Florida. As that court pointed out, the Atlantic Coast Line voluntarily initiated the Cummer scale only for trainloads of logs and the Florida Commission required it to be modified to apply to single-car movements before it permitted this tariff to be filed. (R. 46, 471.) The District Court further said (R. 46):

> * * * and independently of that fact, its status as a lawful rate depended upon its

> allowance by the Florida Commission. It was established as a rate in accordance with and under the laws of Florida, and was for this reason alone a rate made, though not imposed, by authority of that State.

Appellants also contend that Section 13 (4) permits the Interstate Commerce Commission to remove a discrimination against interstate commerce caused by an intrastate rate only in a proceeding involving the entire rate structure of a State or in a proceeding initiated for the sole purpose of increasing a rate or rates.

Paragraph (4) provides that whenever the Commission finds that any intrastate "rate, fare, charge, classification, regulation, or practice" causes undue preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or unjust discrimination against interstate commerce, it shall prescribe the rate, fare, or charge thereafter to be charged and the classification, regulation or practice thereafter to be observed, in such manner as will, in its judgment, remove prejudice or discrimination. It seems impossible to interpret the authority thus disjunctively given over a rate, or a fare, etc., as meaning that the paragraph gives no power except in connection with regulation of the entire rate structure of a State. Moreover, a proceeding to regulate the entire rate structure or one initiated with the sole purpose of increasing intrastate rates is not appropriate to remove undue prej-

udice and paragraph (4) couples the power to remove undue discrimination with the power to remove undue prejudice.

The limitations upon the scope of paragraph (4) which appellants seek to read into it are not only wholly unsupported by its terms, but they are contrary to its purpose. In *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 584, *supra,* this Court said that paragraphs (3) and (4) of Section 13 and Section 15a were added to the Interstate Commerce Act by the Transportation Act, 1920; that Section 15a required the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation; and further (p. 586):

> If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates.

The Court therefore concluded (p. 586) that "it is impossible to escape the dovetail relation" between the provision of Section 13 (4) empowering the Commission to remove any undue discrimina-

tion against interstate commerce and the purpose of Section 15a.

If the purpose of Section 15a is to be carried out and adequate revenue from interstate commerce is to be maintained, the power of the Commission to adjust an intrastate rate which is so low as to place a burden upon the carrier's general interstate commerce should be available in any proceeding before the Commission authorized by the Act when the question of an intrastate rate discriminating against interstate commerce has been put in issue. It would seriously cripple the effectiveness of the power there given to the Commission in its dovetail relation to the purpose of Section 15a if this power could be exerted in only a narrowly limited class of proceedings, as suggested by appellants.

This Court has said that it was within the general powers of the Interstate Commerce Commission to establish intrastate rates on fertilizers and fertilizing material in Alabama on the ground that maintenance of such intrastate rates on a lower basis would result in unjust discrimination against, and undue prejudice to persons and localities in, interstate commerce. *Alabama* v. *United States*, 279 U. S. 229, 230.

The Interstate Commerce Commission has determined that an intrastate rate or practice was unduly prejudicial to, and unduly discriminatory against, interstate commerce, and has required a state-wide increase in the intrastate rate or prac-

tice in cases which were not initiated solely to increase intrastate rates and which involved only particular commodities. *Salt Cases of 1923,* 92 I. C. C. 388, 400–401; *New Mexico Corp. Comm.* v. *A., T. & S. F. Ry. Co.,* 93 I. C. C. 43, 48–49; *Southwestern Brick Cases,* 107 I. C. C. 681, 699; *Arkansas Jobbers & Mfrs. Asso.* v. *A., T. & S. F. Ry. Co.,* 118 I. C. C. 238, 242.

Appellants also suggest that the Commission's order increasing intrastate Florida log rates was invalid because it did not expressly provide that it was made without prejudice to the right of the State or of any other interested party to apply for modification. The orders of the Commission directing an increase in intrastate rates to remove discrimination against interstate commerce which were sustained in *Wisconsin R. R. Comm.* v. *C., B., & Q. R. R. Co.,* 257 U. S. 563, *supra,* and in *New York* v. *United States,* 257 U. S. 591, contained such a reservation. But the effect of the order here in question is not to "freeze" indefinitely Florida log rates on the Atlantic Coast Line. The Commission, apart from any reservation in its order regarding future modification, has the power and duty to modify its order if new conditions warrant a change. A rate order is not *res judicata.* Every rate order made may be superseded by another. *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 445.

II

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION DIRECTING AN INCREASE IN THE ATLANTIC COAST LINE'S FLORIDA LOG RATES TO REMOVE AN UNDUE DISCRIMINATION AGAINST INTERSTATE COMMERCE WAS ISSUED AFTER A FULL HEARING

Appellants contend that the order of the Interstate Commerce Commission, in so far as it directed removal of a discrimination against interstate commerce by an increase in the Atlantic Coast Line's Florida log rates, was not supported by an adequate hearing. It is admitted that the complaint filed with the Commission charged, *inter alia,* that this log rate caused undue discrimination against interstate commerce in violation of Section 13 of the Commerce Act, and that the complaint asked the Commission to terminate this violation. (R. 196, 197). But appellants contend that the Georgia Public Service Commission during the hearing in effect waived any claim based on an increase in the Florida rates and that the drift of the testimony was to the same effect.

The Chairman of the Georgia Commission in urging counsel for intervening Florida lumber companies to state whether or not these intervenors opposed extending the Cummer scale to Florida-Georgia commerce said (R. 421):

> * * * that is all there is in the case, it is all that has ever been in the case, it is all we are asking for and all we hope to gain.

Taking this at its face value and disregarding the fact that the rate expert for the Georgia Commission appearing as a witness for that Commission treated the question of how the alleged prejudice and discrimination should be cured as an open one (R. 417, 706–707), we submit that a statement made in colloquy with opposing counsel is not sufficient to eliminate one of the issues made by the pleadings. We also submit that after other parties had intervened the Georgia Commission alone could not, without the consent of the Commission, eliminate one of the issues even by a formal waiver.

The petitions of intervention of the four intervening railroads and of the American Short Line Railroad Association alleged that they were opposed to the continuance of the Atlantic Coast Line's Florida intrastate log rates and that they considered these rates "unduly and unreasonably low." (R. 226, 228.) The answer of the Atlantic Coast Line denied that its Florida-Georgia rates were unjust or unreasonable, but neither affirmed nor denied the allegation of the complaint that its Florida rates were discriminatory against interstate commerce. (R. 199–200.) Since the relation of the Florida rates to the Florida-Georgia rates was admittedly in issue, this answer necessarily led to the conclusion that if relief were to be granted the Florida rates should be raised. In addition the Atlantic Coast Line offered testimony tending to show that its Florida rates were unreasonably

low. Its chief witness referred to them as "abnormally low" and "far below the level of reasonable log rates," and he doubted exceedingly whether they were compensatory. (R. 475, 477, 492.) The railroad introduced a cost study of its Florida log transportation which, when applied to the revenue therefrom, produced a negligible per-car revenue. (R. 294, 522.) It offered schedules comparing the per-car revenue from its Florida log rates with the per-car revenue from its Florida, Georgia, and Florida-Georgia rates on commodities moving at the lowest rates. (R. 279, 282, 284.)

Certain of the petitions of intervention of the Florida lumber companies alleged that their interest was to prevent an increase in the Atlantic Coast Line's Florida log rates and that these rates were remunerative. (R. 214–215, 219, 232.) The only testimony introduced by the Florida Commission was on the remunerativeness of these rates. It seems abundantly clear that it was never understood that the parties to the proceeding had by universal consent eliminated from the case an increase in Florida rates as a possible means of removing prejudice or discrimination. The report of the examiner who heard the testimony discussed whether the evidence would justify a finding that the Florida rates were so low as to constitute a burden on interstate commerce. (*Supra,* pp. 13–14.)

The Florida interests having been afforded am-

ple opportunity to present their evidence and arguments in support of a continuation of the Cummer scale of rates as against a charge of discrimination against interstate commerce, the test of a sufficient hearing before the Interstate Commerce Commission as laid down by this Court in *New England Divisions Case,* 261 U. S. 184, 200, is fully satisfied.

III

THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE FINDING OF THE INTERSTATE COMMERCE COMMISSION THAT THE ATLANTIC COAST LINE'S FLORIDA INTRASTATE LOG RATES CAUSED UNDUE DISCRIMINATION AGAINST INTERSTATE COMMERCE

Discrimination is a mixed question of law and fact on which the determination of the Interstate Commerce Commission is conclusive when supported by any substantial evidence. *Virginian Ry.* v. *United States,* 272 U. S. 658, 663; *Interstate Commerce Commission* v. *Union Pacific Railroad Company,* 222 U. S. 541, 547–548.

Appellants suggest that the usual rule governing court review of orders of the Commission which are attacked as having been made without supporting evidence does not apply to an order of the Commission affecting intrastate rates, at least where the Commission has ordered an intrastate rate increased in order to remove discrimination against interstate commerce.

In *American Express Co.* v. *Caldwell,* 244 U. S. 617, 627, this Court, in considering the correct meaning of an order of the Commission, said that

where orders of the Commission affect intrastate rates it is desirable that they be so definite as to preclude misapprehension. In *Ill. Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, the Court was also called upon to interpret an order of the Commission. It said that Federal statutes enacted under the commerce clause were not held to supersede or suspend the exercise of the reserved powers of the State except so far as the statutes clearly manifested such a purpose, and (p. 510)—

> This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty.

In *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 580, *supra,* the Court, in holding that the evidence of discrimination against persons or localities would not sustain the Commission's order directing a state-wide increase in intrastate rates prescribed by a State statute, quoted from the foregoing portion of its opinion in the *Illinois Central case.*

It may be that when the Interstate Commerce Commission changes a rate *prescribed* by a State, either by its legislature or by a commission, the courts will exact a higher degree of supporting evidence than in other cases where orders of the Commission are attacked. But where no affirma-

tive State action has been taken and the Commission's order merely trenches upon the traditional powers of the State, there would seem to be no occasion to depart from the usual rule that the courts will not interfere with the Commission's exercise of administrative discretion. This Court has upheld an order of the Commission permitting a railroad to abandon a branch line operated wholly within a State, where, as in this case, the State appeared in the proceedings before the Commission and later brought suit to enjoin the Commission's order on the ground, among others, that it was not supported by evidence. *Colorado* v. *United States,* 271 U. S. 153, *supra.* Nothing in the opinion in that case suggests that a special degree of supporting evidence was requisite.

In the present case the Atlantic Coast Line's Cummer scale of rates was not due to any affirmative action by the Florida Commission. While legally sanctioned by that commission its representatives referred to them at the time they were filed as practically discriminatory and barely remunerative and as made effective contrary to the advice and wishes of the Florida Commission. (R. 271, 272.) In this case, therefore, the Commission's order merely cuts across, in the interest of interstate commerce, certain powers ordinarily reserved to the State, and it does not interfere with rates established in the exercise of a State's rate-making power. We submit that this is not a proper case in

which to establish a novel doctrine concerning the degree of proof necessary to sustain the validity of an order of the Interstate Commerce Commission.

Evidence in support of the Commission's finding that the Cummer scale of rates was so low as to result in undue discrimination against interstate commerce included (a) a cost study of actual operations thereunder, (b) comparison with other log rates, including several approved by the Interstate Commerce Commission and by State commissions, (c) comparison of revenue from the Cummer scale of rates with revenue from rates on other low-grade commodities, and (d) direct testimony of railroad operatives and rate experts that the rates were unduly and unreasonably low.

The Atlantic Coast Line's cost study furnished facts from which the Commission might have concluded that transportation under the Cummer scale of rates was not remunerative. It showed, when compared with the revenue receivable on the basis of average loadings handled on the same line, a net return of $1.34 a car. (R. 23.) But the study was based on trainload movements which could be handled at much less cost than single cars or a few cars attached to regular freight trains. (R. 23, 476–477.) The month covered was one of the least expensive for Florida logging operations on the Atlantic Coast Line. (R. 530.) No allowance was made for interest on investment except on equipment used. (R. 23.) The study involved "certain

arbitrary assumptions," as any study of railroad transportation costs for a single commodity involves allocation of indirect cost, taxes, etc., on assumptions that are more or less arbitrary. The District Court was of the opinion that the Commission, in rejecting the "conclusion of slight net income" shown by this study, "did not rule out the basic facts shown." (R. 169.)

The Cummer scale was so materially lower as to be wholly out of line with all of the numerous log rates in effect in the southeast, including Florida, shown in the record. It was, except for very short distances, less than half (1) interstate log rates in the southeast approved by the Interstate Commerce Commission in other investigations, (2) Alabama intrastate log rates approved by its Commission, (3) Georgia intrastate log rates approved by the Georgia Commission but suspended because of the Florida log rate situation on the Atlantic Coast Line, (4) Florida intrastate log rates on other railroads, and (5) the log rates found reasonable by the Interstate Commerce Commission in this case for application between northern Florida and Georgia on the Atlantic Coast Line, which finding has not been attacked. (*Supra*, pp. 6–7, 11.) The Florida intrastate log rate of the Atlantic Coast Line was over 125% higher for 180 miles than for 170 miles, where the Cummer scale ended, although the increase for the next 120 miles was only 18%. (R. 284–285.)

Almost equally convincing is the showing that, except for short distances, the per-car earnings under the Cummer scale were, generally speaking, only one-third of the per-car earnings on brick, limestone, sand, lime and cement (commodities carried at the lowest rates) transported for equal distances on the Atlantic Coast Line's railroad intrastate in Florida, intrastate in Georgia and interstate Florida-Georgia. (*Supra,* p. 12.) For example, at 70 miles the per-car earnings under the Cummer scale were $12.65 and on the other commodities just mentioned moving intrastate in Florida they were, respectively, $41.08, $47.84, $41.09, $49.76, and $75.69. (R. 285.) At 170 miles like earnings under the Cummer scale were $20.35 and on the other commodities moving intrastate in Florida, respectively, $58.79, $70.98, $61.72, $66.18, and $99.74. (R. 285.)

The District Court, after briefly reviewing the evidence of other rates, including log rates, said (R. 169):

> All these rates were shown to be from twice to thrice the attacked log rate. On the face of things the log rate is too low and likely to burden the carrier.

Witnesses for the Atlantic Coast Line, the Seaboard Air Line and the Central Georgia Railway all testified that the Cummer scale was unduly low. (R. 439, 456, 477.) The Chairman of the Florida Commission so described them shortly after they were filed. (R. 272.)

Appellants take the position that it is improper to base a finding of discrimination against interstate commerce as a whole on mere disparity of rates. But if the unreasonableness of a rate can be shown by disparity, there seems to be no reason why unremunerativeness can not be shown by the same evidence. In *Louisville and Nashville R. R. Co.* v. *United States,* 238 U. S. 1, this Court upheld a decision of the Interstate Commerce Commission which found an existing rate unreasonable and established a lower rate although the complainant before the Commission did not seem to have attempted to prove the cost or value of the carrier's service, but had relied largely on proof that the rate in question was higher than that charged for a similar haul to other points. This Court said (pp. 15–16):

> Giving the widest possible effect to the fact that mere comparison between rates does not necessarily tend to establish the reasonableness of either, it is still true that, when one of many rates is found to be higher than all others, there may arise a presumption that the single rate is high. And when to that is added the fact that some of the comparative and lower rates had been prescribed by the Commission, there was at least a *prima facie* standard which, after allowing for dissimilarity in conditions, might be used along with all the other evidence in order to test the reasonableness of the Nashville rate.

The evidential worth of disparity of rates to show that a rate is too low or too high should not be determined by legalistic rules of general application, but by the intrinsic persuasiveness of the evidence in individual cases. The intrinsic persuasiveness of such evidence could hardly, we believe, be stronger than here. The rate comparisons cover transportation on the railroad whose rate was attacked and on other railroads, in the same State and in neighboring States, and rates approved by the Federal and State Commissions. Among the numerous rates put in evidence there was substantial uniformity and the deviation in the case of the Cummer scale of rates, which the Florida Commission had condemned when it was first established, was so great as to lead irresistibly to the conclusion either that the entire rate level on logs in the southeast was unduly and unreasonably high or that the Cummer scale of rates was unremunerative. The Commission surely did not transgress the limits of its discretion if, faced with these alternatives, it gave weight to its own decisions and those of similar State Commissions. The Commission did not thereby rest its order upon evidence not legally before it, as condemned by this Court in *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 286.

Appellants make the contention that the intrastate Florida rates established by the Commission for the Atlantic Coast Line are so high that traffic would not move under them and that to diminish

traffic could not be an aid to interstate commerce. But unremunerative traffic burdens interstate commerce and the loss of it removes a discrimination against such commerce. In addition, any prediction as to the effect upon traffic of a change in rates is highly speculative, and upon such speculative questions this Court will not substitute its judgment for that of the Commission.

Finally, the Atlantic Coast Line, which would be directly affected if a change in rates would produce less net income, was favorable to a change in the Cummer scale. That railroad would not to-day voluntarily adopt the Cummer scale, and no sacrifice was foreseen from an advance in its Florida log rates to the level ordered by the Commission. (R. 491, 510.) The railroad has intervened in support of the Commission's order, thus confirming the position taken by its witnesses before the Commission.

There was evidence of a probable very extensive Florida intrastate log movement over the Atlantic Coast Line railroad if the Cummer scale of rates were continued, with a resulting heavy burden on interstate commerce if these rates are not compensatory. The Wilson Cypress Company had 250,000,000 feet of uncut timber. (R. 336.) Since carloads average 4,200 feet per car, this uncut timber is equivalent to 59,524 carloads. (R. 571.) The difference in freight between the Cummer scale and that ordered by the Commission for the 120 miles of transportation for these logs is 3.3¢ per 100 pounds,

or $19.80 for a carload of the average weight of 60,000 pounds. (R. 22, 571, 573, 584–585.) For 59,524 carloads the freight difference on this basis is over $1,125,000.

The Brooks-Scanlon Corporation owned timber equivalent to approximately 186,800 carloads. (R. 378–379.) Shipments would be about equally divided between two towns 145 and 160 miles from its mill. (R. 680.) The average increase in rates ordered by the Commission for these two distances is 3.85¢ per 100 pounds, or $23.10 per carload of 60,000 pounds. (R. 22.) For 186,800 carloads the freight difference on this basis is over $4,300,000.

CONCLUSION

It is respectfully submitted that the decree below should be affirmed.

THOMAS D. THACHER,
Solicitor General.

JOHN LORD O'BRIAN,
The Assistant to the Attorney General.

CHARLES H. WESTON,
Special Assistant to the Attorney General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission,
Of Counsel.

APRIL, 1930.

APPENDIX

The Interstate Commerce Act provides:

Section 3. (1) That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (c. 104, 24 Stat. 380; c. 91, 41 Stat. 479; U. S. C. title 49, sec. 3.)

Section 13. (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof, may apply to said commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained

of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

(2) Said commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(3) Whenever any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commis-

sion, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the deci-

sion or order of any State authority to the contrary notwithstanding. (c. 309, 36 Stat. 550; c. 91, 41 Stat. 484; U. S. C. title 49, sec. 13.)

Section 15a. (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided,* That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country. (c. 91, 41 Stat. 488; U. S. C. title 49, sec. 15a.)

U. S. GOVERNMENT PRINTING OFFICE: 1930